Patterson-Stevens, Inc. *and* International Union of Operating Engineers, Local Union No. 17, AFL–CIO. Case 3–CA–17908

March 31, 1997

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On September 27, 1996, Administrative Law Judge Steven Davis issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed answering briefs. The General Counsel and the Charging Party filed cross-exceptions and supporting briefs. The Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.

The judge failed to include "half time payments" for employee Little in his backpay order. After learning at the hearing that employees Little and Mighells had replaced the discriminatees on the NFTA job after the discriminatees had been unlawfully discharged, the General Counsel amended the compliance specification to include them. The compliance specification alleges, inter alia, that the "half time portion of the contributions to the funds" was owed directly to employees covered by the specification. The judge, however, included in his backpay order "half time payments" for those employees originally named in the specification, but failed to list the $32.28 of "half time payments" owed Little as set forth in the amended compliance specification.[2] The judge in his order did include the funds contributions owed on behalf of Little and Mighells. There is no dispute over the calculations as to the amount of the backpay set forth in the specification for employee Little. Therefore, we modify the judge's recommended backpay order to include the $32.28 owed Little.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Patterson-Stevens, Inc., Tonawanda, New York, its officers, agents, successors, and assigns, shall make whole the employees named below by paying them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment, minus tax withholding required by Federal and state laws:

Mike Bower	$7,678.00
Francesco Conidi	7,601.00
Vincent Conidi	6,935.00
Lanny Limburg	15,449.00
Michael Muscarella	58,454.00
Merle Schreckengost	35,242.00
Mr. Little[3]	32.28
TOTAL:	$131,391.28

The Respondent shall pay the following amounts to the named funds, plus any additional amounts that accrue on those amounts to the date of payment as computed in accordance with *Merryweather Optical Co.*, 240 NLRB 1213 (1979):

EJWF Supplemental Fund including delinquency	$1,327.30
Pension Fund including delinquency	23,890.76
Welfare Fund including delinquency	33,977.90
S.U.B. including delinquency	14,865.34
Training Fund including delinquency	10,724.29
Central Pension Fund including delinquency	24,952.57
EJWF/PAP including delinquency	3,539.37
TOTAL:	$113,277.53

The Grand Total owed by the Respondent is: $244,668.81.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] There is no contention that Mighells was due any "half time payments."

[3] The record does not include a first name for employee Little.

Doren Goldstone, Esq., for the General Counsel.
Albert D'Aquino and Thomas Gill, Esqs. (Saperston & Day, P.C.), of Buffalo, New York, for the Respondent.
Richard Furlong and *Adrianne Stella, Esqs. (Furlong & Delmonte, P.C.)*, of Williamsville, New York, for the Union.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. On May 16, 1994, the Board issued its Decision and Order in Case 3–CA–17908, published at 313 NLRB 1229, in which the Board directed Respondent to, inter alia:

> (a) Offer reinstatement to Michael Muscarella and Merle Schrechergest to their former jobs or, if those jobs no longer exist, to substantially equivalent positions . . . and make them whole for any loss of earnings and other benefits.

2. The Employer shall assign work in accordance with the trade jurisdiction of the I.U.O.E. decisions of record and international Union Agreements. In the event that work assignments are made contrary to the aforementioned principles and a contractor operates equipment covered by this Agreement without an engineer and/or apprentice engineer, then two (2) days' pay for each man that should have been required on the equipment shall be paid to the Engineers Local No. 17 General Fund every day said machine was operated.

Under the formula set forth in paragraph 2, the General Counsel doubled the total amount allegedly owing to the Union's General Fund.[4] I do not believe that article XVII is applicable to this proceeding.

It is clear that article XVII applies only to jurisdictional disputes between the Union and one or more other labor organizations. Its title labels it as relating to jurisdictional disputes. Paragraph 1 provides that in the event of such a dispute, the unions are to submit the issue to the International Unions for resolution. If paragraphs 1 and 2 are read together, it may be interpreted as meaning that, following a settlement of an assignment of work by the unions, if the employer thereafter makes assignments contrary to the unions' resolution and the contractor operates equipment without an engineer present, then the 2-day penalty is applied. Here, there is no jurisdictional dispute, and no award of work pursuant to such a dispute. The provision calling for the 2-day penalty would only be applicable if there has been an assignment of work pursuant to a jurisdictional dispute settlement and, if the contractor, regardless of such a settlement, assigns the work to another craft.

If paragraph 2 is read separately to cover only the Employer's assignments which should be made in accordance with the jurisdiction of the International Union, the article is similarly inapplicable to this proceeding. It is the General Counsel's argument that the employees at issue here are unit employees, operating engineers, under the Heavy and Highway agreement. Accordingly, by assigning work to them, Respondent assigned work to an engineer pursuant to article XVII.

[4] G.C. Exh. 12.

For the above reasons, article XVII is not applicable here. Accordingly, since any sums due the Union's General Fund are owing as a result of article XVII, I find that no sums are due the General Fund.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Patterson-Stevens, Inc., Tonawanda, New York, its officers, agents, successors, and assigns, shall make whole the employees named below by paying them the amounts set forth opposite their names, plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), accrued to the date of payment, minus tax withholding required by Federal and state laws:

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Respondent shall make the following payments to the funds as set forth below, as more fully set forth in General Counsel's Exhibit 12(e), as an appendix to the compliance specification, as augmented by the payment of interest. *Merryweather Optical Co.*, 240 NLRB 1213 (1979):

	Total Including Delinquency
EJWF Supplemental Fund	$1,327.30
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EJWF/PAP	3,539.37
Grand Total including delinquency	$113,277.54

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

clude, and I permitted Respondent to adduce evidence at the hearing.

B. *The Representation Case*

While the compliance matter was being investigated, a representation proceeding was being processed.

On February 8, 1994, the Union filed a petition in Case 3–RC–10095, in which it sought to represent "all employees described in Article III . . . of the collective-bargaining agreement between Patterson-Stevens, Inc. and the Union." The petition stated that the Union was recognized by Respondent pursuant to the collective-bargaining agreement at issue in the instant hearing, and sought to be certified.

Following a hearing, the Acting Regional Director, on March 30, 1994, issued a Decision and Direction of Election, finding that the appropriate bargaining unit was the same as that set forth in the collective-bargaining contract. Respondent filed a request for review, arguing that the unit consisted of only one person, and that therefore the petition should be dismissed. On July 5, 1994, the Board denied the request for review on the ground that it raised no substantial issues warranting review.

On April 6, 1994, Respondent sent the Regional Office an *Excelsior* election eligibility list "containing the names and addresses of Patterson-Stevens, Inc. employees that constitute eligible voters in accordance with the Decision and Direction of Election."

That list contained five names: Mike Bower, Frank Conidi, Vince Conidi, Lanny Limburg, and Robert Proefrock, known throughout this proceeding as the "group of five." Patterson testified that these workers were his "core employees," who were skilled in specific areas of the Company's work, such as concrete, commercial swimming pool, or railroad work. He identified the type of work they do: start compressors, operate equipment, chipping, shoveling dirt, trowel flooring, apply membrane roofing, install sheet vinyl pool lining, and performing work on gutters and filtration. They work at building sites, buildings, and industrial railroad sidings for industry.

II. MUSCARELLA AND SCHRECKENGOST

As set forth above, the Board found that on May 28, 1993, Respondent unlawfully laid off Michael Muscarella and Merle Schrechergest, and ordered that they be offered reinstatement.

On June 11, 1993, Respondent sent the following letter to each employee:

> We plan on re-starting the project at the Niagara Frontier Transportation Authority (NFTA) soon. We would like to know if you would like to resume work with us when we do. Please contact our office as soon as possible if you are available for work.

Respondent's answers do not contend that those letters constitute valid offers of reinstatement, but at the hearing requested that they be considered as such.

Compliance Supervisor Friend determined that those letters did not constitute a valid offer of reinstatement since they constituted only an inquiry as to whether the employees were interested in employment, and not an actual offer of reinstatement. I agree. "An offer of employment must be specific, unequivocal, and unconditional in order to toll backpay and satisfy a respondent's remedial obligation." *Holo-Krome Co.*, 302 NLRB 452, 454 (1991). A virtually identical offer has been found to be insufficient. *L'Ermitage Hotel*, 293 NLRB 924, 927 (1989).

Proper offers of reinstatement were sent on June 21, 1995, notifying the two employees that they had 10 days to respond to the offer. They did not reply, and their backpay was tolled on July 1, 1995.

Muscarella and Schreckengost were employed by Respondent, and worked on the NFTA project. They were unlawfully laid off on May 28, 1993. On June 21, 1993, Respondent was prohibited by the general contractor from performing any further work on that project.

A. *The Main Arguments*

Respondent's main argument with respect to its backpay liability concerning Muscarella and Schreckengost is that it performed only one job, the NFTA project, pursuant to the collective-bargaining agreement, and employed only two employees, the discriminatees, on that project to perform work under that contract. Respondent claims that following its being prohibited from performing any further work on the NFTA project on June 21, 1993, no other operating engineer's work was available for the two employees.

Apart from the issue of the offers of reinstatement, Respondent thus contends that its maximum liability for backpay is for 3 to 4 weeks, from May 28, 1993, the date of their layoff, until June 21, when Respondent's work on the project was terminated.

The General Counsel argues that notwithstanding that Respondent's work on the NFTA jobsite ended in late June, nevertheless the two employees could have continued to perform work on other projects which Respondent was performing. Evidence was adduced at the hearing concerning Respondent's other jobs following its cessation of work on the NFTA jobsite.

Gross backpay was computed by averaging the hours worked by the group of five Respondent's employees who were employed during the backpay period. Those were the workers named on the voter eligibility list submitted by Respondent, as set forth above, who according to the General Counsel, are bargaining unit employees.

Those five were chosen by the General Counsel inasmuch as (a) Respondent's payroll records did not specify what type of work was being performed by Respondent's employees; and (b) those five were identified by Respondent, by virtue of their being placed on the *Excelsior* list, as employees in the same collective-bargaining unit as set forth in the collective-bargaining agreement pursuant to which the two discriminatees were employed.

Having received the names of employees in the unit, Compliance Supervisor Friend was then able to determine which jobs were worked on by the group of five, in order to determine whether bargaining unit work was performed on those jobs.

He then concluded that the five employees which Respondent named as being within the bargaining unit set forth in the collective-bargaining agreement were performing bargaining unit work during the backpay period.

The records concerning that group of five employees were used for two purposes: (a) to determine the hours that

and would not apply to Respondent's other work.[3] However, Patterson further testified that the union agents told him that by signing the contract, "building work" would be excluded. That last statement is, of course, consistent with what the Heavy and Highway contract, quoted above, says, that it shall "not apply to the actual building, foundations, structural portion, and interiors of buildings that are normally covered by Building agreements in the geographical area of this agreement."

The three union agents all testified, denying that they agreed to limit the application of the signed agreement to the NFTA project. They further stated that they would not have agreed to such a limitation, and that it is the Union's policy not to limit the application of its contracts.

I cannot credit Patterson's testimony. I find that the union representatives did not agree to limit the application of the contract to the NFTA project. The contract itself bears no such limitation. In addition, Patterson offered somewhat inconsistent testimony in stating that the union agents told him that "building work" would be excluded from the contract. By its terms, the contract excludes work that is normally covered by building agreements. Thus, the union agents did not limit the applicability of the contract any more than it did by its terms.

The question then becomes whether the work performed by the group of five was, in fact, work unit work, performed within the Heavy and Highway contract, or whether it was building work, which was excluded from the coverage of the contract.

B. *The Work Performed by Respondent*

Patterson testified that Respondent's work during the backpay period consisted of the renovation and repair of commercial swimming pools, installation of chemically resistant and waterproof floors, concrete repair, grouting and epoxy injection of buildings and foundations, and railroad construction and renovation, which included maintenance and repair of railroad sidings and plant buildings.

NFTA (Niagara Frontier Transportation Authority), a system for public transportation, required the installation of new roadways or the repair of roadways at three intersections in Buffalo. The pavement was adjacent to, and in between the railroad tracks. Respondent also worked on the rails, by changing bolts and gauge rods between the rails.

Patterson concedes that his work on the NFTA project was covered by the Heavy and Highway contract he signed with the Union.

Respondent performed work on other projects during the backpay period, as to which it was stipulated that during the period May 31 to July 1, 1995, such work customarily involved the operation of some or all of the following equipment: backhoe, skid steer, bobcat, loader, busters (hammer), compressor, spiking machines, tampers, pumps, motorized buggy, power trowels, elevators, and gunite machine.

As to such equipment, Heavy and Highway Contractor George Panepinto testified that all such equipment was typically used in the operation of his construction business. He stated specifically that the backhoe, skid steer, bobcat, loader, and compressor were all operated by operating engineers. The concrete buster, if pneumatic and attached to a machine, is also operated by an operating engineer. However, a hand held buster is operated by a laborer. Spiking machines and riding tampers, if they are self-propelled, and if the spiking machine requires no manual lifting are operated by an operating engineer. If they are smaller machines, and a "walk-behind," they are laborers' work. Pumps larger than 3 inches are operating engineers' work; smaller pumps are laborers' work. If a motorized buggy can be ridden, it is operated by an operating engineer, but it is usually assigned to laborers. Large power trowels are operated by operating engineers. Small ones are operated by cement finishers. If elevators are used for hoisting equipment, operating engineers are used. If passengers are being carried, a negotiation process takes place with the contractor. Large gunite machines with pumps and pressure groutings are operated by an operating engineer; smaller ones are operated by laborers. Boom trucks are usually operated by a teamster. However, if the boom truck is used to carry materials for hoisting, an operating engineer is assigned to the truck.

Nevertheless, Respondent claimed that certain jobs it performed during the backpay period were not covered by the Heavy and Highway agreement. Those jobs are as follows:

1. The construction of a commercial wading pool, using gunite. Employee Lanny Limburg, a foreman for Respondent, also testified concerning that job. Respondent's employees used heavy equipment to excavate the pool. Employees dug drains and drain boxes and removed a fence using a backhoe and a skid steer. A subcontractor used a dozer.

Patterson testified that the Department of Labor reviewed that project and gave its opinion that all the wages on that project should be based upon the building contract, and not the Heavy and Highway contract. Union president and business manager, Hopkins, testified that the Union and its contracting employers resolve issues concerning the application of the contract—not the Department of Labor.

2. Georgia Pacific—Respondent had a maintenance agreement, requiring that it maintain the rails in good condition. Such rails enter the company's warehouse facility. Respondent claims that such work comes within the Union's building agreement, and not the Heavy and Highway agreement, because the rails enter a building and constitute a railroad siding. Respondent notes that in contrast, NFTA, did not involve any work in buildings, but just constituted work on pavement and rails unrelated to any structure.

Limburg testified that during his work on this job, the crew numbered two to five employees. During such work, Respondent's employees used such heavy equipment as a boom truck and backhoe and skid steer. The work involved replacing railroad ties.

3. Nabisco—Respondent's work consisted of removing a wood floor in a factory, chipping up the existing grout, moving it to a dumpster, and installing reinforcing and a new concrete floor. Patterson testified that such work was not Heavy and Highway work because it was performed in a building, and because the compressed air for the chipping hammers was supplied by the plant, and not by compressors brought in by Respondent.

Limburg testified that his work at Nabisco involved concrete work, and railroad siding repairs within the plant. He

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A. *The Main Arguments*

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Having received the names of employees in the unit, Compliance Supervisor Friend was then able to determine which jobs were worked on by the group of five, in order to determine whether bargaining unit work was performed on those jobs.

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If paragraph 2 is read separately to cover only the Employer's assignments which should be made in accordance with the jurisdiction of the International Union, the article is similarly inapplicable to this proceeding. It is the General Counsel's argument that the employees at issue here are unit employees, operating engineers, under the Heavy and Highway agreement. Accordingly, by assigning work to them, Respondent assigned work to an engineer pursuant to article XVII.

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For the above reasons, article XVII is not applicable here. Accordingly, since any sums due the Union's General Fund are owing as a result of article XVII, I find that no sums are due the General Fund.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

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EJWF Supplemental Fund	$1,327.30
Pension Fund	23,890.76
Welfare Fund	33,977.90
S.U.B. Fund	14,865.34
Training Fund	10,724.29
Central Pension Fund	24,952.57
EJWF/PAP	3,539.37
Grand Total including delinquency	$113,277.54

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.